

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 KST DATA, INC.,

12 Plaintiff,

13 v.

14
15 NORTHROP GRUMMAN SYSTEMS
16 CORPORATION,

17 Defendant.
18
19

} Case No. CV 17-5125-MWF (PJWx)

} **FINDINGS OF FACT AND**
} **CONCLUSIONS OF LAW**
}
}
}
}
}
}
}
}

20 This matter came on for trial before the Court sitting without a jury on September 3,
21 2019. Gary S. Lincenberg, Esq., Nicole Rodriguez Van Dyk, Esq., Ashley D. Bowman,
22 Esq., and Jonathan M. Jackson, Esq., of Bird Marella, Boxer, Wolpert, Nessim, Dooks,
23 Lincenberg, Rhow, P.C., appeared on behalf of the Plaintiff KST Data, Inc. (“KST”).
24 Christopher T. Casamassima, Esq., Andrew E. Shipley, Esq., and Souvik Saha, Esq., of
25 Wilmer Hale LLP, appeared on behalf of Defendant Northrop Grumman Systems
26 Corporation (“Northrop”).

27 Mr. Lincenberg and Mr. Casamassima gave opening statements. The following
28 witnesses were called and examined by the parties in the order recited below:

1 On the same day, following opening statements, Ms. Van Dyk began to examine
2 **Armando Tan**, KST's corporate representative and Vice President of Operations. That
3 examination continued on September 4, 2019. Mr. Casamassima then cross-examined Mr.
4 Tan. Ms. Van Dyk began to conduct her redirect examination, which continued on
5 September 5, 2019.

6 Mr. Jackson, appearing for KST, examined **Mark Edson**, Vice President of Sales
7 for KST. Mr. Casamassima then cross-examined Mr. Edson.

8 KST admitted the testimony of **Johnny Archer** via declaration. Mr. Casamassima
9 then cross-examined Mr. Archer. Ms. Bowman conducted a redirect examination.

10 Mr. Lincenberg and Ms. Bowman read from the deposition transcript of **Ken**
11 **Brown**, Northrop's director of supply chain.

12 Plaintiff then rested.

13 Northrop played the video deposition testimony of **Jeff Ferguson**. That
14 examination continued on September 6, 2019.

15 Mr. Saha examined **John Jordan**, the global supply chain director for the missile
16 defense and protective systems division. Ms. Van Dyk then cross-examined Mr. Jordan.

17 Next, Mr. Casamassima and Mr. Saha read from the deposition transcript of
18 **Eugene Jacobwitz**, the general manager of KST. That reading continued on September
19 10, 2019.

20 Mr. Casamassima and Mr. Saha read from the deposition of **Mr. Edson**.

21 Mr. Saha examined **Gary Fourney**, the director of the supply chain for the global
22 logistics and modernization division at Northrop. Mr. Lincenberg then cross-examined
23 Mr. Fourney. Mr. Saha then conducted a redirect examination.

24 Mr. Casamassima examined **Mr. Brown** in court, the corporate director of the
25 supply chain for Northrop. Mr. Lincenberg then cross-examined Mr. Brown. The cross-
26 examination continued on September 11, 2019. Mr. Casamassima conducted a redirect
27 examination, and Mr. Lincenberg then conducted a recross-examination.

28 ///

1 On September 13, 2019, Ms Van Dyk made a closing argument on behalf of KST
 2 and Mr. Casamassima made a closing argument on behalf of Northrop. Ms. Van Dyk also
 3 made a rebuttal argument on behalf of KST.

4 Following the presentation of evidence and the parties' closing arguments, the
 5 matter was taken under submission.

6 Having carefully reviewed the record and the arguments of the parties, as presented
 7 at the hearing and in their written submissions, the Court now makes the following
 8 findings of fact and reaches the following conclusions of law pursuant to Rule 52 of the
 9 Federal Rules of Civil Procedure. Any finding of fact that constitutes a conclusion of law
 10 is also hereby adopted as a conclusion of law, and any conclusion of law that constitutes a
 11 finding of fact is also hereby adopted as a finding of fact.

12 Based on these findings of fact and conclusions of law, the Court returns a verdict
 13 in favor of KST and awards damages.

14 **I. FINDINGS OF FACT**

15 **A. The Parties**

16 1. Plaintiff KST filed this action for breach of contract and breach of implied
 17 covenant of good faith and fair dealing.

18 2. KST is a California corporation, with its principal place of business in Los
 19 Angeles, California. KST provides technology products and services to a range of private
 20 and government clients, including Northrop.

21 3. Northrop is a Delaware corporation, which operates facilities in locations
 22 across the country, including in Redondo Beach, California. Northrop is a global security
 23 company that provides systems, products, and solutions to the United States Government
 24 as well as other government and commercial customers worldwide.

25 **B. The Witness Testimony**

26 **a. *Armando Tan***

27 4. On direct examination, Mr. Tan generally discussed KST's relationship with
 28 Northrop, along with various provisions of Corporate Award #3263 (the "Corporate

1 Award"). The thrust of Mr. Tan's testimony was that KST and Northrop had a good
2 business relationship prior to and during the performance of the Corporate Award, that
3 KST was responsible for procuring certain equipment for Northrop prior to it actually
4 being ordered by Northrop, and that KST was seeking financial protection for procuring
5 that equipment.

6 5. Mr. Tan also discussed on direct the circumstances around the National
7 Aeronautics and Space Administration ("NASA") suspension of KST from contracting
8 with the United States Government (the "Suspension") due to allegations of serious
9 misconduct, and the extent of KST's communications with Northrop regarding the
10 Suspension. The thrust of Mr. Tan's direct testimony on this topic was that while the
11 Suspension was serious, it only applied to government contracts (and therefore not the
12 Corporate Award), and that KST was forthright with Northrop regarding the Suspension.

13 6. Mr. Tan further discussed KST's relationship with SYNEX Corporation
14 ("Synnex"), and Northrop's knowledge of that relationship. Specifically, Mr. Tan
15 testified that Northrop employees toured Synnex facilities with KST, and understood their
16 relationship.

17 7. Mr. Tan further testified on direct regarding Northrop's ceasing of orders
18 from KST pursuant to the Corporate Award after the Suspension, and how KST was
19 receiving mixed messages from Northrop regarding whether Northrop would resume
20 ordering from KST at any point. Finally, Mr. Tan testified regarding the amount of
21 inventory KST was holding that KST believed it should be compensated for as a result of
22 Northrop's alleged breach of the Corporate Award. Relatedly, Mr. Tan testified regarding
23 KST's efforts to mitigate its damages by selling its inventory to Big Blue.

24 8. During his cross-examination, Mr. Tan conceded that there were certain
25 details about the Suspension that KST did not share with Northrop, including the specific
26 allegations in the NASA Acquisition Integrity Program (AIP) Action Referral
27 Memorandum ("ARM"). That was because KST did not actually share the ARM with
28 Northrop. Additionally, during his cross-examination, Mr. Tan acknowledged that he had

1 been arrested and his role changed as a result of his arrest, as he could no longer supervise
2 or work on certain government contracts.

3 9. Additionally, during the cross-examination, Mr. Casamassima attempted to
4 cast doubt on Mr. Tan's previous testimony regarding KST's damages, attacking both
5 whether the inventory in question was ever forecasted by Northrop and the price of the
6 inventory in question. Additionally, during cross-examination, Mr. Tan admitted that the
7 inventory for which KST sought damages was held by Synnex, and that the damages
8 stemmed from KST's agreement to purchase the inventory from Synnex.

9 10. Finally, during cross-examination Mr. Tan admitted that some employees of
10 Northrop did not seem to be aware of Synnex's relationship with KST.

11 **b. Mark Edson**

12 11. On direct examination, Mr. Edson echoed Mr. Tan's testimony regarding the
13 Corporate Award, and specifically the importance of KST being protected against
14 acquiring inventory Northrop later decided it did not need. Mr. Edson also testified
15 regarding KST's relationship with Synnex, and Northrop's knowledge of that relationship.

16 12. Finally, Mr. Edson testified further regarding KST's discussion of the
17 Suspension with Northrop. Specifically, he described a call he was on (which KST had
18 suggested) where KST described the Suspension to Northrop, along with thinking that
19 Northrop would resume ordering from KST once the Suspension was lifted.

20 13. During the cross-examination, Mr. Edson testified regarding KST's mention
21 of Synnex in its discovery responses. Additionally, Mr. Edson testified further about
22 KST's conversations with Northrop relating to the Suspension, specifically that KST
23 never informed Northrop that its offices were searched, or the criminal investigation.

24 **c. Johnny Archer**

25 14. During cross-examination, Mr. Archer admitted that mention of Synnex was
26 removed from documents sent to Northrop, and there were internal communications with
27 KST instructing the same.

28 ///

1 15. During his redirect examination, Mr. Archer testified regarding forecasts
2 from Northrop and KST's relationship with Synnex, including Northrop's knowledge of
3 the same.

4 **d. Ken Brown**

5 16. During the reading of his deposition transcript, Mr. Brown testified regarding
6 the process Northrop has in place to suspend or block a contractor, and noted that KST
7 was never officially suspended or blocked in Northrop's internal system. Instead,
8 Northrop officials were instructed, based on guidance from legal, to stop placing orders
9 with KST until further notice. Mr. Brown did not testify further as to what that exact
10 guidance from legal was, nor the basis for that guidance, citing the attorney-client
11 privilege. Mr. Brown repeatedly referred to it as putting KST on "pause."

12 17. Mr. Brown further testified (via deposition) that KST performed under the
13 contract, and that the Suspension had no technical impact on the Corporate Award,
14 considering that the Suspension only applied to government contracts. Mr. Brown also
15 testified regarding the internal discussions at Northrop, in which numerous Northrop
16 employees expressed a desire to continue ordering from KST. Mr. Brown also testified
17 regarding Northrop's knowledge with respect to the inventory KST was holding for
18 Northrop in the fourth quarter of 2015, and indicated that Northrop had at least some
19 awareness regarding that inventory.

20 18. Finally, Mr. Brown testified (during deposition) regarding the conversations
21 between KST and Northrop regarding resuming orders. Specifically, Mr. Brown testified
22 that it was false to say he was "pursuing" options to get KST all clear, and he did not
23 know why anyone told that to Mr. Tan.

24 19. When he was examined in court, Mr. Brown discussed the Corporate Award
25 in some detail. He also testified regarding Northrop's knowledge of Synnex, and while he
26 was not surprised that KST needed Synnex's help in staging and warehousing, that is very
27 different than Synnex directly purchasing the inventory from HP and subcontracting. He
28 would be concerned about Synnex undertaking such a role because of costs and security.

1 20. He also testified that he had been involved with the termination of suppliers a
2 couple of times, and KST was not terminated. Instead, KST was put on “pause” while
3 Northrop tried to figure out what was happening with the Suspension. The business side
4 did not want to move away from KST, but Northrop’s counsel was worried. He also
5 testified that Northrop purchased the inventory from Future Tech Enterprises, Inc.
6 (“Future Tech”) because it was a “crucial” time for Northrop and while it wanted KST to
7 become re-established, Northrop could not wait any longer.

8 21. Mr. Brown further testified that he was “shocked” when he received a letter
9 from KST regarding termination because he did not think there was a termination. He
10 also did not understand why KST could not have sold the inventory easily to someone
11 else, because he had heard from Hewlett-Packard (“HP”) that the inventory was not
12 designed specifically for Northrop.

13 22. During his in-court cross-examination, Mr. Brown continued to discuss the
14 Corporate Award. Mr. Brown also conceded that there is no language in the Corporate
15 Award that KST must purchase from HP directly, but Mr. Brown said that was the
16 “intent.” He also conceded that KST only needed to have title at the time of delivery, and
17 not prior. He also conceded that he was aware of some concern at KST regarding holding
18 the inventory for forecasted items prior to signing the Corporate Award. He also said
19 prior to October 2015 he was not aware of any instances when Northrop failed to purchase
20 forecasted inventory. And he testified that as of November 2018, he was not aware of any
21 material breaches of the Corporate Award by KST.

22 23. He also testified that he was not aware whether there was a legal bar from
23 Northrop purchasing from KST during the Suspension. But, he conceded that starting in
24 October 2015, Northrop was internally barred from purchasing from KST under the
25 Corporate Award, and never purchased again after the Suspension. Mr. Brown also
26 conceded that he is not aware of any evidence disputing that Northrop employees visited
27 Synnex.

28 ///

1 24. Finally, Mr. Brown conceded that Northrop gave KST mixed messages
2 regarding ordering the inventory even after it had acquired replacement inventory from
3 Future Tech.

4 **e. *Jeff Ferguson***

5 25. During his video deposition testimony, Mr. Ferguson testified regarding
6 KST's relationship with Synnex, and his lack of knowledge of that relationship. He also
7 testified that it surprised him that KST forwarded the Northrop forecast to anyone,
8 because it was very important to Northrop that as few parties were involved in the
9 Corporate Award as possible, as the supply chain was very important. Accordingly, he
10 was very surprised to learn Synnex was KST's subcontractor.

11 26. Mr. Ferguson further testified (via deposition) that he was never told why
12 Northrop stopped ordering from KST, and while Northrop eventually purchased the
13 equipment at issue from Future Tech, that was not his preference, and he would have
14 preferred to purchase the equipment from KST.

15 **f. *John Jordan***

16 27. His main topic of testimony was KST's Suspension, and how it impacted
17 Northrop. Specifically, he testified that issues like suspensions and disbarment are
18 "significant" and are disruptive, and they come with reputational risks as well, so
19 Northrop just wanted to find out what happened. Accordingly, Northrop wanted to review
20 certain materials and wanted to find out the facts of what happened (including the basis
21 for the Suspension, what they were doing to address it, and how long it would last).
22 Northrop wanted to hear KST out, but Northrop had doubts. KST told Northrop that it
23 was hoping to lift the suspension in 30-60 days, and did not provide the ARM to Northrop
24 because it "lacked specificity." Also, KST claimed it had done nothing wrong.

25 28. Mr. Jordan further testified on direct that Northrop did not continue placing
26 orders with KST even after the Suspension lifted because Northrop was concerned that
27 KST was not truly forthcoming with Northrop about the Suspension, specifically by not
28 providing the ARM and not discussing the related criminal investigation. Mr. Jordan

1 further noted that the ARM was very specific, making KST's statement that it lacked
2 specificity appear untrue. Finally, Mr. Jordan testified regarding his investigation into the
3 relationship between KST and an entity known as DME, which also was part of the
4 Suspension and criminal investigation.

5 29. During his cross-examination, Mr. Jordan confirmed that KST gave Northrop
6 access to its lawyers to discuss the Suspension, who also spoke to each other regarding the
7 relationship between KST and DME. He also testified that it was "interesting" to learn
8 that the allegations in the ARM were not substantiated. Finally, he confirmed that the
9 automatic block in Northrop's system for KST remained in place after the Suspension was
10 lifted.

11 **g. Eugene Jacobwitz**

12 30. Mr. Jacobwitz generally discussed the relationship between KST and Synnex,
13 and KST's communications to Northrop regarding the Suspension.

14 **h. Gary Fourney**

15 31. Mr. Fourney testified that he had no issues with KST until October 2015,
16 when he found out about the Suspension. He also noted that Northrop did not find out
17 from KST, which left a bad taste in his mouth. He also testified he could count on "one
18 hand" the number of suppliers who had been suspended. He testified that he received
19 guidance that he could keep using KST for already contracted orders, but that Northrop
20 should not place any new orders. That being said, he testified that it was always his
21 intention to keep going with KST as soon as everything was resolved. He further testified
22 that he tried to slow roll ordering the replacement inventory to give KST a chance to
23 resolve its issues.

24 32. Mr. Fourney also testified regarding KST's inventory, and whether Northrop
25 was going to try to compensate KST for that inventory. He recalled wanting to help KST
26 liquidate its inventory, but that Northrop was not liable.

27 33. During his cross examination, Mr. Fourney testified further regarding his
28 desire to order from KST even after the Suspension, when Northrop had knowledge of

1 KST's Suspension, and KST's inventory. Specifically, Mr. Fourney conceded that while
2 he did not hear of KST's Suspension from KST, lawyers for Northrop were told by KST
3 lawyers.

4 34. Based on the testimony of these witnesses and its review of the exhibits, the
5 Court **FINDS** as follows:

6 **C. The Corporate Award – Terms and Definitions**

7 35. In August 2010, KST and Northrop entered into the Corporate Award,
8 effective August 1, 2010. (Ex. 17). The Corporate Award was a written contract pursuant
9 to which KST agreed to sell Northrop certain computers and computer related-products
10 and services for Northrop's internal use. (*Id.*). The Corporate Award was not a
11 government contract. (*Id.*).

12 36. The Corporate Award's effective date was subsequently extended through
13 July 31, 2016, at which point it expired per its express terms.

14 37. Because there is a dispute with respect to the intent of the parties to the
15 Corporate Award based on the extrinsic evidence presented to the Court, the Court will
16 make factual findings regarding the contract pursuant to California law. (*See Conclusion*
17 *of Law No. 6*).

18 38. The Corporate Award enabled all elements of Northrop to purchase KST's
19 products and related services at the prices and subject to the terms and conditions of the
20 Corporate Award for Northrop's internal equipment needs.

21 39. The Corporate Award explicitly incorporated Exhibit A, the Desktop
22 Solution Program ("DSP") Statement of Work (the "SOW"), setting forth KST's
23 obligations for hardware purchase, preparation, and delivery under the Corporate Award.
24 (Ex. 30).

25 40. Under Section 32 of the Corporate Award, KST is not permitted to
26 subcontract a part of the Award without Northrop's prior written approval. (Ex. 17).

27 41. Section 16.2 of the Corporate Award required KST to have title to all product
28 offered for sale to Northrop. (*Id.*).

1 42. Section 16.5 of the Corporate Award required KST to comply with all
2 applicable federal, state, and local laws, rules, and regulations and ordinances in the
3 performance of the Corporate Award. (*Id.*).

4 43. Section 2.2 of the Corporate Award required Northrop to permit its operating
5 elements to purchase products and services from KST pursuant to the terms of the Award.
6 (*Id.*).

7 44. Amendments 20 and 23 to the Corporate Award sets forth the pricing
8 applicable to the inventory in dispute in this action. (*Id.*).

9 45. Section 3.1 of the Corporate Award provides that Northrop was to issue
10 forecasts to KST. (Ex. 17). These forecasts were to be provided by Northrop on a
11 quarterly basis, and were to represent Northrop's "good-faith estimate of its projected
12 purchasing requirements" for the ensuing twelve months, based on the information
13 available to Northrop at the time of the forecast. (*Id.*).

14 46. Section 3.1 of the Corporate Award also expressly provides that KST was to
15 use Northrop's forecasts for KST's "internal planning requirements." (*Id.*). Section 3.1
16 further states that Northrop had "no obligation to purchase the number of units set forth in
17 the Forecast or place an order for any minimum dollar amount or quantity of Products
18 and/or Services with [KST] during the term" of the Corporate Award. (*Id.*).

19 47. Additionally, Pursuant to Section 1.2 of the Corporate Award, the term
20 "forecast" is defined as a "non-binding written forecast" of Northrop's "expected purchase
21 requirements" for KST's products and services. (*Id.*).

22 48. Section 4(A)(1) of the DSP SOW required KST to maintain, at all times,
23 inventory equal to the amount of products in Northrop's quarterly forecast, plus an
24 additional 25%. (Ex. 30). Armando Tan testified to the same.

25 49. KST was thus required to stock 125% of the inventory included in Northrop's
26 most recent quarterly forecast, and to purchase and stage this inventory prior to the
27 issuance of any purchase order by Northrop.

28 ///

1 50. Northrop required KST to maintain this inventory in part so that KST could
2 deliver products, many of which were customized to Northrop's specifications and
3 typically required eight weeks to manufacture and ship from OEMs, within days of
4 receiving a purchase order from Northrop.

5 51. Northrop was aware that KST ordered inventory based on Northrop's product
6 forecasts. Moreover, Northrop requested and received from KST regular updates on the
7 status of KST's inventory.

8 52. Section 3.2 of the Corporate Award requires that "[a]ll purchases . . . shall be
9 written, facsimile, or electronic Purchase Order," which the Corporate Award defines as
10 "an order issued by any number of the Buyer Group for the purchase of Products from
11 [KST] pursuant to this Award." (Ex. 17).

12 53. The parties do not dispute that the Corporate Award was a valid, binding
13 contract between KST and Northrop. Accordingly, the Court **FINDS** that the Corporate
14 Award was a valid, binding contract.

15 **D. Termination Under the Corporate Award**

16 54. The Corporate Award contains two termination provisions, Sections 6.3 and
17 6.4. (*Id.*). Section 6.3 of the Corporate Award permitted Northrop to terminate the
18 contract for cause under certain conditions. (*Id.*). Northrop does not suggest or argue it
19 terminated the Corporate Award for cause under Section 6.3, or had cause to do so.

20 55. Section 6.4 of the Corporate Award permitted Northrop to terminate the
21 contract "in whole or in part . . . at any time and for any reason" if Northrop (1) gave
22 written notice of the termination to KST; and (2) compensated KST for any outstanding
23 purchase orders plus up to 4,500 units that were part of Northrop's forecast. (*Id.*).

24 56. KST officials testified that KST specifically negotiated Section 6.4 of the
25 Corporate award because, for the first time in the parties' business relationship, the DSP
26 SOW contained an explicit requirement that KST must purchase and stock inventory
27 based on Northrop's forecasts.

28 ///

1 57. Accordingly, in order to protect itself from being stuck with units that it had
2 ordered in reliance on Northrop's forecasts, KST sought Section 6.4 as protection in the
3 event that Northrop decided to terminate the Corporate Award before its expiration date.
4 Communications between KST and Northrop, as well as testimony from KST officials,
5 suggest the same.

6 58. Mr. Brown testified that the terms of the Corporate Award, including Section
7 6.4, were negotiated over the course of roughly one year.

8 59. While Northrop witnesses tried to downplay the importance of Section 6.4 to
9 KST, Mr. Brown indicated he had some general awareness of KST's concerns with
10 respect to procuring forecasted inventory.

11 60. Accordingly, the Court **FINDS** that Section 6.4 was specifically included in
12 the Corporate Award to protect KST from being financially liable for forecasted inventory
13 which was not ordered by Northrop in the event of a termination for convenience.

14 **E. Performance Under the Corporate Award**

15 61. From 2010 through approximately September 2015, the parties performed
16 under the Corporate Award. Northrop issued quarterly forecasts, the parties participated
17 in weekly calls regarding those forecasts, and KST purchased products and maintained
18 inventory based on those forecasts. Northrop then issued purchase orders for the
19 previously forecasted units, KST delivered products under those purchase orders, and
20 Northrop paid for those products under the Corporate Award's pricing schedule, as
21 amended from time to time.

22 62. At his deposition and at trial, Mr. Brown testified that KST did not fail to
23 perform any material term of the Corporate Award.

24 63. Northrop continued to issue forecasts pursuant to the Corporate Award
25 through September 2015, and Northrop's forecast for Q4 of 2015 was approximately 3500
26 units. Based on that forecast, KST ordered the corresponding products as required
27 through Synnex, which purchased the forecasted products from the manufacturer, HP.

28 ///

1 64. At that time, KST became financially and contractually committed to
2 purchase the products from Synnex. Mr. Tan testified that Northrop had never failed to
3 purchase all of the forecasted inventory prior to Fall 2015.

4 65. The Court **FINDS** that KST performed all of its material obligations under
5 the Corporate Award. Specifically, the Court determines that KST was supplying
6 computer units to Northrop pursuant to the Corporate Award for many years prior to the
7 Suspension, and did not materially breach the Corporate Award.

8 66. Northrop presented evidence and argument that KST failed to perform the
9 Corporate Award based on KST's use of Synnex. Specifically, Northrop argued that KST
10 failed to perform under the Corporate Award because Synnex held title to the inventory at
11 issue, which violated the Corporate Award's ban on subcontracting. KST rebutted that
12 argument with evidence that Northrop was aware, at least to some extent, of KST's
13 relationship with Synnex.

14 67. The Court **FINDS** that KST was not entirely forthright about its relationship
15 with Synnex to Northrop, and that KST used Synnex for more than just warehousing.

16 68. However, pursuant to Legal Conclusion Nos. 2-3, the Court **FINDS** that
17 KST's use of Synnex was a non-material breach of the Corporate Award rather than
18 material non-performance. The purpose of the Corporate Award was for KST to supply
19 inventory to Northrop, which KST consistently did. Additionally, there was ample
20 testimony and evidence that Northrop was familiar with KST's use of Synnex in some
21 capacity, at least as a warehouse, but still accepted KST's inventory. Northrop failed to
22 establish that even if KST was using Synnex as more than a warehouse, and even if
23 Synnex held title to the inventory prior to it being transferred to Northrop, that this was a
24 material breach of the Corporate Award.

25 69. Northrop did produce evidence and testimony that it was important to
26 Northrop that few companies dealt with the inventory prior to Northrop receiving it, due
27 to national security concerns, among other issues. However, Northrop did not establish
28

1 that this rose to the level of a material breach. Accordingly, KST performed under the
2 Corporate Award.

3 **F. NASA Suspension and DOJ Criminal Investigation of KST**

4 70. On or around September 30, 2015, the National Aeronautics and Space
5 Administration (“NASA”) suspended KST from contracting with the United States
6 Government (the “Suspension”) due to allegations of serious misconduct. (Ex. 509).

7 71. Multiple KST witnesses testified that the Suspension only applied to KST’s
8 contract with government entities, and did not violate any terms of the Corporate Award
9 or otherwise impact KST’s or Northrop’s rights, obligations, or performances under the
10 Corporate Award.

11 72. According to Mr. Tan’s testimony, KST informed Northrop about its
12 Suspension on or around October 6, 2015, and requested a meeting with Northrop. (Exs.
13 151, 551). Northrop agreed, but requested that KST provide a written summary of the
14 issues underlying the Suspension in advance of the meeting, which was scheduled for and
15 occurred on October 9, 2015. (Ex. 141).

16 73. In its written summary of the Suspension, and in its communications with
17 Northrop during and after the October 9, 2015 meeting, KST misrepresented or omitted
18 facts regarding the Suspension, including that KST’s offices were searched. (*Id.*). KST
19 further informed Northrop that it expected the Suspension to be lifted within 30-60 days.
20 (*Id.*).

21 74. Upon learning of the Suspension, Mr. Jordan testified that Northrop entered
22 KST into an internal tracking system, which prohibited all of Northrop’s operating
23 elements from purchasing any products from KST under the Corporate Award (or any
24 other contract). Mr. Tan testified that he believed it was reasonable for Northrop to be
25 concerned that KST was being suspended from government procurement activities.

26 75. On November 20, 2015, KST and NASA entered into an Interim
27 Administrative Agreement (“IAA”) to lift the Suspension. (Ex. 518). The IAA provided
28 that NASA and KST both agreed that “adequate cause to suspend KST” existed “based

1 upon the facts as alleged in the NASA Acquisition Integrity Program (AIP) Action
2 Referral Memorandum (ARM) dated September 30, 2015, which is incorporated into the
3 Notice of Suspension.” (Ex. 518).

4 76. KST failed to provide Northrop with the ARM, and instead represented to
5 Northrop that the ARM “lacked specificity” and the allegations therein did not appear
6 related to KST. (Exs. 141, 511). Mr. Jordan testified to the same.

7 77. Additionally, Mr. Jacobwitz testified via deposition testimony that it could be
8 considered misleading if KST told Northrop it would let Northrop know if KST was never
9 a target of a criminal investigation.

10 78. The IAA expressly provided that “NASA [had] not determined that KST is
11 presently responsible with regard to receiving any specific Federal Government contract,
12 grant, or other non-procurement award.” (Ex. 518).

13 79. In its correspondence with Northrop, including in multiple letters between
14 April 2016 and November 2016, KST repeatedly represented to Northrop that, vis-à-vis
15 the IAA, KST had been “cleared” or deemed by the Federal Government to be a presently
16 responsible contractor. (Ex. 237).

17 80. Mr. Jacobwitz testified (via deposition) that KST may not have been truthful
18 with Northrop about KST being “presently responsible” once the settlement had been
19 lifted, as that representation seemed to be in conflict with the IAA.

20 81. Accordingly, the Court **FINDS** that KST was not entirely forthright with
21 Northrop regarding its Suspension.

22 82. However, the Court further **FINDS** that the Suspension and KST’s
23 communications with Northrop in connection with the Suspension – or lack thereof – did
24 not justify a Termination for Cause under Section 6.3 of the Corporate Award.

25 **G. Northrop’s Decision to “Pause” Placing Orders with KST**

26 83. Because the Corporate Award was not a government contract, the Suspension
27 did not preclude Northrop from continuing to place orders with KST under the Corporate
28 Award. However, soon after learning about the Suspension, Northrop decided to pause

1 placing orders under the Corporate Award pending resolution of KST's Suspension. Mr.
2 Brown testified that this decision came from Northrop's legal department, and many
3 inside Northrop wanted to keep ordering from KST. (Ex. 184).

4 84. Northrop also put together a presentation which provided that there was a
5 "low risk" from ordering from KST, but there was a "reputational" risk to consider as
6 well. (*Id.*).

7 85. Mr. Brown also testified that this decision was a "business decision" based
8 on legal guidance and advice, and Northrop was not precluded from using KST devices.

9 86. As a result, by October 22, 2015, Northrop had made a "final decision" to
10 stop purchasing from KST (pending resolution of the Suspension) but did not inform KST
11 of that fact. Mr. Brown confirmed this, as does Exhibit 147.

12 87. Also in October 2015, Northrop decided to solicit a bid from another
13 supplier, Future Tech, for all of the units of computer equipment Northrop needed from its
14 latest forecasts to KST. (Ex. 149).

15 88. By early November 2015, Northrop had finalized a deal with Future Tech to
16 purchase all of the units at issue. Northrop did not inform KST of that fact, but instead
17 continued to tell KST that it would resume purchasing once the Suspension had been
18 resolved.

19 89. Northrop did not issue a Purchase Order for the inventory at issue in this
20 lawsuit, including during the period following the execution of the IAA to lift the
21 Suspension. Instead, Northrop continued its "pause" in light of the ongoing criminal
22 investigation of KST conducted by the U.S. Department of Justice.

23 90. In late 2015, Northrop's in-house counsel held several meetings to discuss
24 the situation with KST. By December 2015, Northrop's lawyers had formulated a
25 "standard response" to any questions regarding KST and circulated that response to
26 Northrop's employees. Northrop has claimed attorney-client privilege regarding the
27 contents of these meetings and the content of the "standard response." (Ex. 170).

28 ///

1 91. In January 2016, Northrop again instructed its business units that they could
2 no longer purchase any products from KST. Northrop did not inform KST of that fact.
3 Instead, Northrop instructed its employees to refrain from discussing the matter with KST,
4 while it continued to tell KST that its status was under review internally. (Ex. 149).

5 92. Mr. Tan testified that during this time period, Northrop never indicated it
6 would stop ordering after the Suspension was lifted, but instead said once the all clear was
7 given, Northrop would resume purchasing. This continued even after KST informed
8 Northrop that the Suspension was lifted. (Exs. 153, 157, 159, 160, 172).

9 93. In fact, when Mr. Ferguson told Mr. Tan that Mr. Brown was “pursuing”
10 getting KST “all clear” with Northrop, Mr. Brown later testified (via deposition) that the
11 statement was not true, he was not pursuing any such thing, and did not know why Mr.
12 Ferguson told Mr. Tan he was. (Ex. 159).

13 94. Throughout the time period between September 30, 2015 and July 31, 2016,
14 Northrop remained hopeful that KST could resolve its legal issues with the Federal
15 Government. During this time period, Northrop’s business units wanted to purchase
16 products from KST, but did not.

17 95. At no time prior to the Corporate Award’s expiration on July 31, 2016 did
18 Northrop explicitly invoke the Corporate Award’s termination procedures.

19 96. Northrop did not purchase any units from KST under the Corporate Award
20 after KST was suspended.

21 **H. Northrop’s Breach of the Corporate Award**

22 97. As noted above, the Court **FINDS** that (1) there was a valid contract between
23 KST and Northrop; and (2) KST performed under the Corporate Award. Accordingly, the
24 Court must determine whether Northrop breached the Corporate Award.

25 98. KST argues that the failure of Northrop to either (1) continue ordering under
26 the Corporate Award; or (2) follow the procedures of Section 6.4 constitutes a breach of
27 the Corporate Award. Northrop disagrees, arguing that it was entitled to put KST on
28 “pause.” The Court **FINDS** that Northrop breached the Corporate Award by

1 (a) preventing its business units from purchasing any products from KST beginning in
2 October 2015; and (b) failing to comply with Section 6.4 by not notifying KST in writing
3 and not purchasing up to 4,500 units that were part of its forecast.

4 99. Quite simply, the Corporate Award did not expressly cover KST's legal
5 situation in the Fall of 2015 – where KST does not violate the law, but was under
6 investigation for doing so, such that Northrop did not want to continue doing business
7 with KST. Northrop may have wished, in hindsight, that such a situation would allow it to
8 terminate the Corporate Award for cause, but that is not how the Corporate Award was
9 written.

10 100. Instead, the Corporate Award designated several scenarios (none of which
11 apply here) when the Corporate Award could be terminated for cause, otherwise the
12 Corporate Award had to be terminated for convenience, which subjected Northrop to
13 Section 6.4's requirement of purchasing up to 4,500 units it forecasted.

14 101. Northrop cleverly tried to avoid the requirements of Section 6.4 by arguing
15 that there never was a termination, just a “pause.” Of course, this argument would read
16 Section 6.4 entirely out of the contract. Under this reading, Northrop would always
17 choose to “pause” the Corporate Award and avoid paying KST for the forecasted units at
18 any time and for any reason, and such a reading is not plausible in light of the extensive
19 negotiation regarding Section 6.4 specifically, and Section 6.4's importance to KST.

20 102. And despite Northrop's arguments that it intended to order from KST as soon
21 as the Suspension was lifted, its actions suggest otherwise. For example, Northrop
22 ordered replacement inventory from Future Tech in October or November of 2015, while
23 still indicating to KST that it was trying to work out the situation such that Northrop could
24 order from KST again.

25 ///

26 ///

27 ///

28 ///

1 **I. The Disputed Inventory**

2 103. On April 20, 2016, KST sent Northrop a letter invoking the Corporate
3 Award's dispute resolution procedures. (Ex. 181).

4 104. The April 20, 2016 letter stated that, pursuant to Section 6.4 of the Corporate
5 Award, Northrop terminated the Corporate Award for its convenience and was therefore
6 required to pay for the equipment that KST had purchased based on Northrop's forecast.
7 (*Id.*).

8 105. In the same letter, however, KST acknowledged that it "has not received a
9 notice that the Corporate Award had been terminated." (*Id.*).

10 106. On June 6, 2016, Northrop responded in writing informing KST that
11 Northrop had made a business decision to purchase the units at issue from another
12 supplier, and encouraged KST to sell the units in its inventory to a third party buyer in
13 order to mitigate its damages. (Ex. 229).

14 107. In a subsequent letter dated July 28, 2016, Northrop reiterated that it no
15 longer needed any of the units at issue because it had purchased them from another
16 supplier, and affirmed that it would not negotiate with KST regarding the pricing
17 discounts that KST had previously offered (both orally and in writing) regarding those
18 units. (Ex. 233).

19 108. All of the inventory at issue was purchased from HP by Synnex. At all times
20 during the term of the Corporate Award, Synnex held the legal title to the at-issue
21 inventory, prior to its delivery to Northrop. Mr. Brown testified that it surprised him to
22 learn that Synnex held title.

23 109. However, Mr. Tan testified that Northrop was aware of Synnex, and even
24 toured its facilities with KST officials. And Mr. Brown testified that it was his
25 understanding that KST had title at the time of delivery, not prior, and that title at the time
26 of delivery was the only title he was concerned with.

27 110. That being said, there was evidence that KST tried to hide Synnex's
28 involvement in the Corporate Award from Northrop, including the fact that certain

1 spreadsheets had different Synnex PO numbers when sent to HP versus when sent to
2 Northrop. (Exs. 598-601). There was also an email where KST was removing the “S”
3 from serial numbers. (Ex. 603). Additionally, in February 2015, Mr. Ferguson wrote that
4 he had “no knowledge” of Synnex. (Ex. 98).

5 111. However, Mr. Edson testified that he made no effort to hide KST’s use of
6 Synnex.

7 112. On February 28, 2017 – seven months after the Corporate Award’s expiration
8 – KST and Synnex entered into a Settlement and Release Agreement concerning the at-
9 issue inventory (“Settlement Agreement”). (Ex. 244).

10 113. Per the Settlement Agreement, KST was required to issue two purchase
11 orders, totaling \$3,252,777.60 within sixty days for the inventory at issue. (Ex. 244). Mr.
12 Tan testified that KST had already paid \$2.1 million of this amount. (Exs. 256-58, 287).

13 114. The earliest evidence of KST’s payment to Synnex – for a fraction of the at-
14 issue inventory – is August 31, 2017.

15 115. Mr. Tan testified that in July 2017, KST sold 3,117 computers from the
16 inventory at issue in this case to a company called Big Blue for \$906,300. Mr. Tan
17 testified that KST received other offers from other companies for less money, but declined
18 them.

19 116. When the Corporate award expired on July 31, 2016, KST retained inventory
20 of roughly 3,117 units that it had instructed its distributor, Synnex, to purchase in reliance
21 on Northrop’s forecasts. (Exs. 110, 210-213). This inventory is valued at \$4,356,869
22 according to the operative pricing schedule in Amendments 20 and 23 to the Corporate
23 Award. (Exs. 28, 304). This is consistent with KST officials’ testimony.

24 117. Mr. Tan testified there were also storage fees associated with this inventory
25 of roughly \$60,000. (Exs. 222-228). Mr. Tan testified that KST also had to pay interest
26 of more than \$145,000.

27 118. However, it appears that only four checks were issued to Synnex from KST
28 as of February 2018, totaling \$1.66 million. (Exs. 260, 523).

1 119. Based on the above, KST argues it is entitled to various damages:
2 (1) \$3,450,569 (the contract price minus the dollar value paid by Baby Blue);
3 (2) \$6,000,000 (the value of the inventory when it was purchased by Synnex minus the
4 dollar value paid by Baby Blue); (3) out-of-pocket costs associated with the warehousing
5 of equipment and settlement with Synnex; and (4) pre- and post-judgment interest.

6 120. On the other hand, Northrop argues that KST is not entitled to damages,
7 because Synnex held title of the inventory during the Corporate Award, and KST did not
8 actually incur liability until February 2017, after the Corporate Award expired. Northrop
9 also argues that there is no evidence in support of its claim that the disputed inventory is
10 worth \$4,356,869. Finally, Northrop points to the fact that KST only paid Synnex
11 \$3,252,777.60, minus the \$906,300 Baby Blue paid KST.

12 121. The Court **FINDS** that KST is entitled to \$3,655,569 in damages, which
13 includes (i) \$3,450,569 in damages, (ii) \$60,000 in storage fees associated with this
14 inventory; and (iii) \$145,000 in interest. For (i), pursuant to Section 6.4, in the event of a
15 termination by convenience, KST is entitled to the “contract value” of the inventory at
16 issue. KST is *not* entitled to the higher value of the inventory when it was purchased by
17 Synnex, but it is entitled to the contract value of the disputed inventory, \$4,356,869.00, as
18 testified to by KST officials and indicated in the exhibits, minus the \$906,300 that KST
19 ultimately obtained from the selling the units to Baby Blue. (Exs. 28, 110, 244, 304).

20 122. As for (ii), Mr. Tan testified there were also storage fees associated with this
21 inventory of roughly \$60,000. (Exs. 222-228). As for (iii), Mr. Tan testified that KST
22 also had to pay interest of more than \$145,000.

23 123. Accordingly, the Court **FINDS** that KST has established the existence of the
24 contract; its performance of the contract; Northrop’s unexcused breach of the contract; and
25 its damages.

26 124. The total damages are \$3,655,569.

27 ///

28 ///

II. CONCLUSIONS OF LAW

A. Relevant Legal Principles

1. To prevail on a breach of contract claim, a plaintiff must establish: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach of either express or implied terms of the contract, and (4) damage to plaintiff. *Abdelhamid v. Fire Ins. Exchange*, 182 Cal. App. 4th 990, 999, 106 Cal. Rptr. 3d 26 (2010).

2. However, "[t]he law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated." *GoDigital, Inc. v. Contentbridge Sys., LLC*, No. LACV1707066JAKAFMX, 2018 WL 1918731, at *4 (C.D. Cal. Mar. 23, 2018) (quoting *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1051, 241. Cal. Rptr. 487 (1987)). Indeed, "only '[w]hen a party's failure to perform a contractual obligation constitutes a material breach of the contract, [is] the other party ... discharged from its duty to perform under the contract.'" *Id.* (quoting *Brown v. Grimes*, 192 Cal. App. 4th 265, 277, 120 Cal. Rptr. 3d 893 (2011)).

3. "Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.'" *Grimes*, 192 Cal. App. 4th at 278 (quoting 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 852, pp. 938–940).

4. Additionally, "[e]very contract imposes upon each party a duty [or covenant] of good faith and fair dealing in its performance and its enforcement." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 683, 254 Cal. Rptr. 211 (1988) (affirming dismissal of an employee's claim for relief alleging a tortious breach of the implied covenant of good faith and fair dealing). "There are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." *Progressive West Ins. Co. v. Superior Court*, 135 Cal. App. 4th

1 263, 278, 37 Cal. Rptr. 3d 434 (2005) (holding that the insured could not state a claim for
2 breach of the implied covenant without showing the withholding of a benefit that was in
3 fact due under the contract).

4 5. However, a claim for “breach of the implied covenant of good faith and fair
5 dealing involves something beyond breach of the contractual duty itself.” *IV Sols., Inc. v.*
6 *Connecticut Gen. Life Ins. Co.*, No. CV 13-9026-GW(AJWX), 2015 WL 12843822, at
7 *10 (C.D. Cal. Jan. 29, 2015). “[If] the allegations do not go beyond the statement of a
8 mere contract breach and, relying on the same alleged acts, simply seek the same damages
9 or other relief already claimed in a companion contract cause of action, they may be
10 disregarded as superfluous[.]” *Id.* (quoting *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*,
11 222 Cal. App. 3d 1371, 1394-95, 272 Cal. Rptr. 387 (1990)).

12 6. Pursuant to California law, fact finders are “not prohibited from
13 interpreting contracts. Interpretation of a written instrument becomes solely a judicial
14 function only when it is based on the words of the instrument alone, when there is no
15 conflict in the extrinsic evidence, or when a determination was made based on
16 incompetent evidence.” *City of Hope Nat’l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375,
17 395, 75 Cal. Rptr. 3d 333 (2008) (citing *Parsons v. Bristol Development Co.*, (1965) 62
18 Cal. 2d 861, 865, 44 Cal. Rptr. 767 (1965)). But, when “ascertaining the intent of the
19 parties at the time the contract was executed depends on the credibility
20 of extrinsic evidence, that credibility determination and the interpretation of
21 the contract are questions of fact.” *Id.*; see also 1 B.E. Witkin, *Summary of California*
22 *Law*, Contracts § 764 (11th ed. 2020) (“Interpretation of a written instrument is solely a
23 judicial function unless interpretation turns on the credibility of extrinsic evidence,”
24 because “where the parol evidence is in conflict, the trial court's resolution of that conflict
25 is a question of fact and must be upheld if supported by substantial evidence”). In the
26 Court’s view, interpreting this contract is an issue of fact because of the nature of the
27 extrinsic evidence, but the Court would interpret this contract the same way as a matter of
28 law in the absence of extrinsic evidence.

1 **B. Northrop’s Affirmative Defenses**

2 7. Northrop asserts four affirmative defenses: (a) estoppel; (b) unclean hands;
3 (c) justification; and (d) KST’s failure to mitigate damages.

4 **a. *Estoppel***

5 8. “The traditional elements of equitable estoppel are that: (1) the party to be
6 estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or
7 must so act that the party invoking estoppel has a right to believe it is so intended, (3) the
8 party invoking estoppel must be ignorant of the true facts, and (4) he or she must
9 detrimentally rely on the former’s conduct.” *United States v. Hemmen*, 51 F.3d 883, 892
10 (9th Cir. 1995).

11 9. Northrop argues that this defense bars KST’s claims because (1) KST knew
12 that it did not hold title to the inventory at issue; (2) Northrop did not know that Synnex
13 held title to the inventory at issue; and (3) Northrop relied on KST’s misrepresentations to
14 its detriment.

15 10. The Court **CONCLUDES** that Northrop did not rely on KST’s
16 representations to its *detriment*, and accordingly estoppel does not apply. As discussed
17 above, the Court **FINDS** that KST’s use of Synnex was not a material breach of the
18 Corporate Award, and therefore the Court does not agree with Northrop that the title of
19 the inventory prior to delivery was crucial. Instead, the weight of the evidence indicated
20 that the title of the inventory prior to delivery was immaterial. Accordingly, there was no
21 detrimental reliance, and no estoppel.

22 **b. *Unclean Hands***

23 11. “To prevail on a defense of unclean hands, a defendant must demonstrate by
24 clear and convincing evidence (1) ‘that the plaintiff’s conduct is inequitable;’ and (2) ‘that
25 the conduct relates to the subject matter of [the plaintiff’s] claims.’” *POM Wonderful LLC*
26 *v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1092 (C.D. Cal. 2016) (quoting *Fuddruckers,*
27 *Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 847 (9th Cir. 1987)). “With respect to the
28 first requirement, ‘[o]nly a showing of wrongfulness, willfulness, bad faith, or gross

1 negligence, proved by clear and convincing evidence, will establish sufficient culpability
2 for invocation of the doctrine of unclean hands.” *Id.* (quoting *Pfizer, Inc. v. Int’l Rectifier*
3 *Corp.*, 685 F.2d 357, 359 (9th Cir.1982)).

4 12. Additionally, “[e]ven if a defendant satisfies both prongs, however, courts
5 must not automatically apply the doctrine of unclean hands and ‘permit a defendant
6 wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is
7 possibly guilty of transgressing the law.’” *Id.* (quoting *Johnson v. Yellow Cab Transit*
8 *Co.*, 321 U.S. 383, 387 (1944)). “Rather, determining whether the doctrine of unclean
9 hands precludes relief requires balancing the alleged wrongdoing of the plaintiff against
10 that of the defendant, and weigh[ing] the substance of the right asserted by [the] plaintiff
11 against the transgression which, it is contended, serves to foreclose that right.” *Id.* (citing
12 *Northbay Wellness Grp., Inc.*, 789 F.3d 956, 960 (9th Cir.2015)).

13 13. Northrop argues that KST’s recovery is barred under the unclean hands
14 doctrine because of KST repeatedly misrepresenting and/or concealing the facts and
15 circumstances regarding the Suspension, and failing to share with Northrop material facts
16 regarding the government’s allegations against KST. Northrop also points to KST’s
17 statement that it was a “presently responsible” contractor, knowing that the representation
18 would be important to Northrop, to induce Northrop to place orders with KST.

19 14. Northrop also argues that KST’s mischaracterizations regarding its
20 relationship with Synnex is a further basis to bar Plaintiff’s claims.

21 15. While the Court did **FIND** that some of KST’s communications with
22 Northrop regarding the Suspension and Synnex were misleading, the Court
23 **CONCLUDES** that the unclean hands doctrine does not bar KST’s claims. This
24 conclusion is based on the Court’s determination that KST’s actions do **not** rise to the
25 level required for the unclean hands doctrine to apply.

26 16. Specifically, KST’s wrongdoing should not foreclose its right to recover
27 pursuant to Section 6.4. Northrop would not have acted any differently had KST been
28 **completely** forthright regarding its Suspension; KST’s Suspension did not justify a

1 termination for cause, and Northrop would have not placed orders with KST, just like it
2 did. Additionally, while KST may not have been *completely* forthright with Northrop
3 regarding both the Suspension and Synnex, it did disclose both the existence of the
4 Suspension and some of its relationship with Synnex to Northrop. And as stated above,
5 the Court **FINDS** that KST's use of Synnex was not a material breach of the Corporate
6 Award.

7 17. Accordingly, the weight of the evidence does not support the application of
8 the unclean hand doctrine to bar KST's claims.

9 **c. *Justification***

10 18. Northrop next argues that the conduct that KST suggests breached the
11 Corporate Award was justified. Specifically, Northrop argues that it had no obligation to
12 purchase inventory based on forecasts it submitted to KST, which were non-binding.
13 Northrop further argues that because the Corporate Award clearly vested sole discretion in
14 Northrop to place orders with KST without a minimum purchasing requirement, its
15 decision to stop placing orders with KST was contractually permissible.

16 19. Northrop also argues that KST's Suspension further justified Northrop's
17 decision to pause.

18 20. The Court **CONCLUDES** that the defense of justification does not bar
19 KST's claims. As discussed above, the Court **FINDS** that Northrop breached the
20 Corporate Award with respect to Section 6.4. Specifically, while Northrop argues that
21 under the Corporate Award it had no obligation to purchase inventory contained in the
22 forecasts, that ignores Section 6.4's requirements, which state that in the event of a
23 termination for convivence, Northrop was obligated to purchase forecasted inventory, up
24 to 4500 units. Northrop cannot read Section 6.4 out of the contract, especially considering
25 the weight of the evidence, which demonstrated the importance of Section 6.4 to KST.

26 21. As for the Suspension, as discussed above, the Suspension does not justify
27 Northrop ignoring Section 6.4's requirements.

28 ///

1 **d. *Failure to Mitigate Damages***

2 22. “The doctrine of mitigation of damages holds that ‘[a] plaintiff who suffers
3 damage as a result of either a breach of contract or a tort has a duty to take reasonable
4 steps to mitigate those damages and will not be able to recover for any losses which could
5 have been thus avoided.’” *Valle de Oro Bank v. Gamboa*, 26 Cal. App. 4th 1686, 1691,
6 32 Cal. Rptr. 2d 329 (1994) (quoting *Shaffer v. Debbas*, 17 Cal. App. 4th 33, 41, 21 Cal.
7 Rptr. 2d 110 (1993)). “A plaintiff may not recover for damages avoidable through
8 ordinary care and reasonable exertion.” *Id.*

9 23. Northrop argues that KST failed to mitigate its damages, as it unreasonably
10 delayed re-selling the inventory at issue to other customers. Northrop further argues that
11 KST’s failure to disclose Synnex as the actual owner of the inventory at issue is additional
12 evidence of its failure to mitigate. Finally, Northrop argues that KST’s financial
13 commitment to Synnex regarding the disputed inventory, which is inconsistent with the
14 Corporate Award, is a further failure of KST to mitigate.

15 24. The Court **CONCLUDES** that KST properly mitigated its damages.
16 Specifically, Mr. Tan testified that KST considered several offers for the disputed
17 inventory, before eventually selling the inventory to Big Blue for \$906,300. KST
18 witnesses also testified that the inventory was configured for Northrop, which made
19 selling the inventory more difficult.

20 25. The Court also notes that Northrop’s arguments regarding KST’s delay in
21 selling the disputed inventory are not well taken, considering the weight of the evidence
22 which suggests that Northrop was less than forthcoming with KST regarding whether it
23 was going to purchase the disputed inventory. For example, Exhibit 159 is an email from
24 Mr. Ferguson to Mr. Tan, dated November 25, 2015, which stated that Mr. Brown was
25 “pursuing” getting KST all clear when Mr. Brown was doing no such thing. In fact,
26 Northrop did not officially inform KST that it would not be purchasing the forecasted
27 inventory until June 2016 (Ex. 229). Accordingly, Northrop can hardly fault KST for any
28 “delay.”

1 26. The Court also determines that KST's financial commitment to Synnex does
2 not constitute a failure to mitigate damages; KST was utilizing its normal process to
3 procure the inventory needed to satisfy Northrop's forecasts. Again, had Northrop been
4 forthright with KST regarding its status, KST may have been able to act sooner.

5 27. Given the circumstances, the Court **CONCLUDES** that KST exercised
6 ordinary care and used reasonable exertion to mitigate its damages.

7 **C. Implied Covenant of Good Faith and Fair Dealing**

8 28. The Court determines that Northrop breached the Corporate Award with
9 KST, as stated above. Accordingly, for the same reasons, the Court **CONCLUDES**
10 Northrop is liable to KST on KST's claim for breach of the implied covenant of good faith
11 and fair dealing.

12 29. However, the Court also **CONCLUDES** that KST is not entitled to additional
13 damages for this claim. KST's factual predicate for this claim is identical to its claim for
14 breach of contract; namely that Northrop acted improperly when it stopped ordering
15 inventory from KST after the Suspension and failed to make KST whole pursuant to
16 Section 6.4. Accordingly, KST is not entitled to additional damages other than those
17 pursuant to Section 6.4. *See Careau*, 222 Cal. App. at 1394-95.

18 **III. VERDICT**

19 The Court returns the following verdict:

20 On KST's claims for breach of contract and the implied covenant of good faith and
21 fair dealing, in favor of KST and against Northrop. Damages are \$3,655,569.

22 The Court will enter a separate judgment pursuant to Rules 54 and 58(b) of the
23 Federal Rules of Civil Procedure.

24
25 Dated: June 10, 2020



26 MICHAEL W. FITZGERALD
27 United States District Judge
28